SUNDARAJAN SOKALINGAM v. FREDRICK INDRAN XA NICHOLAS; BADAN PEGUAM MALAYSIA (INTERVENER)

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
MOHAMAD ARIFF YUSOF JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: A-02-(IM)-821-05-2014]
11 MARCH 2015

LEGAL PROFESSION: *Disciplinary Committee – Findings – Disciplinary Committee constituted for inquiry of Advocate and Solicitor's misconduct – Findings and recommendation of Disciplinary Committee came two years and seven months after conclusion of inquiry – Advocate and Solicitor suspended for 12 months by Perak Bar Committee – Period of suspension reduced to six months by High Court upon appeal – Whether two year term of Disciplinary Committee had expired – Whether Chairman of Disciplinary Committee applied for extension of term – Whether complied with provisions and rules of Legal Profession Act 1976*

The appellant, an Advocate and Solicitor, had sought someone to impersonate an accused person whom he was representing in a criminal case and to 'stand in' for the accused in the Sessions Court. The Bar Council ('the intervener') demanded for an explanation and issued a show cause letter to the appellant. Even though the Disciplinary Committee ('DC') constituted by the respondent concluded its inquiry on 18 August 2010, the findings and recommendations were made almost two years and seven months later. The appellant was suspended for three months and fined RM8,000. After making his representation under s. 94(3) of the Legal Profession Act 1976 ('LPA'), the respondent suspended the appellant from practice for 12 months. After an appeal to the High Court, the appellant's period of suspension was reduced to six months. In the present appeal, the appellant contended that by the time the DC made its reports stating its findings and recommendations, the two year term of the DC panel had expired. The intervener submitted that the delay was technical since at all times, except during his period of imprisonment, the appellant had continued to practice without facing any prejudice.

Held (allowing appeal; setting aside order of suspension)
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) Rule 26(3) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 ('the Rules') provides that the term may be extended upon an application in writing made by the Chairman of the DC; and by the Chairman of the Disciplinary Board ('DB') if there are reasonable grounds to do so. Neither of these was put before this court or the High Court. Without extension, the term of appointment had expired and any such member

of a DC panel no longer had any authority to continue as a member of the panel to submit a report. Therefore, the report made was not a report in accordance with the LPA and its rules and should have been rejected in totality and not accepted as the basis to impose any punishment. (para 22)

(2) The appellant had been convicted and had served a sentence of imprisonment, had appeared before the investigating tribunal, DC, DB, the High Court and this court. The imperative of punishing him professionally by starting the process afresh was far outweighed by what he had endured and the point of the exercise as a professional punishment was by now so lost in the mists of time that, being undertaken by the very same body in the flawed earlier proceedings, it might take on the appearance of vindictive punishment. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang Peguambela dan Peguamcara, telah meminta seseorang menyamar sebagai tertuduh yang diwakili olehnya dalam satu kes jenayah dan untuk berdiri sebagai tertuduh di Mahkamah Sesyen. Majlis Peguam ('pencelah') meminta satu penjelasan dan mengeluarkan satu surat tunjuk sebab kepada perayu. Walaupun Jawatankuasa Tatatertib ('DC') yang dibentuk oleh responden memutuskan inkuiri pada 18 Ogos 2010, dapatan-dapatan dan cadangan-cadangan dibuat hampir dua tahun dan tujuh bulan kemudian. Perayu digantung selama tiga bulan dan didenda RM8,000. Selepas membuat representasi di bawah s. 94(3) Akta Profesion Undang-undang 1976 ('LPA'), responden menggantung perayu daripada amalan selama 12 bulan. Selepas satu rayuan kepada Mahkamah Tinggi, tempoh penggantungan perayu dikurangkan kepada enam bulan. Dalam rayuan ini, perayu menghujahkan bahawa apabila DC membuat laporannya mengenai dapatan-dapatan dan cadangan-cadangannya, tempoh dua tahun panel DC telah tamat. Pencelah menghujahkan bahawa kelewatan bersifat teknikal kerana pada setiap masa, kecuali semasa tempoh pemenjaraannya, perayu terus beramal tanpa menghadapi sebarang prejudis.

Diputuskan (membenarkan rayuan; mengenepikan perintah penggantungan)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Aturan 26(3) Kaedah-kaedah Profesion Undang-Undang (Prosiding Tatatertib) (Tribunal Penyiasatan dan Jawatankuasa Tatatertib) 1994 memperuntukkan bahawa tempoh boleh dilanjutkan melalui permohonan yang dibuat secara bertulis oleh Pengerusi DC; dan oleh Pengerusi Lembaga Tatatertib ('DB'), sekiranya terdapat alasan-alasan munasabah untuk berbuat sedemikian. Kedua-duanya tidak dikemukakan di mahkamah ini mahupun di Mahkamah Tinggi. Tanpa

sebarang lanjutan, tempoh pelantikan telah luput dan mana-mana ahli panel DC tidak mempunyai kuasa meneruskan sebagai ahli panel untuk mengemukakan laporan. Oleh itu, laporan yang dibuat bukanlah laporan yang selaras dengan LPA dan kaedah-kaedahnya dan sepatutnya ditolak sepenuhnya dan tidak diterima sebagai dasar untuk mengenakan hukuman.

(2) Perayu telah disabitkan dan telah menjalani hukuman penjara, telah dihadapkan di tribunal penyiasatan, DC, DB, Mahkamah Tinggi dan mahkamah ini. Imperatif menjatuhkan hukuman secara profesional dengan memulakan proses baru jauh mengatasi apa yang telah dijalaninya dan tujuan langkah ini adalah sebagai hukuman profesional kini hilang dalam kabus masa hinggakan, dijalankan oleh badan yang sama dalam prosiding terdahulu yang cacat, ia mungkin kelihatan seperti hukuman bersifat dendam.

Case(s) referred to:
Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***
Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(3)(a), 103B, 103F
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 PU(A) 189/1994, r. 26(3)
Rules of Court 2012, O. 1A

For the appellant - Stanis Laus Venthanayagam; M/s MS Vethanayagam & Assocs
For the respondent & intervener - Shanmugam Ganesan; M/s Mureli Navaratnam

[Editor's note: For the High Court judgment, please see Sundarajan Sokalingam v. Fredrick Indran XA Nicholas; Malaysian Bar Council (Intervener) [2014] 1 LNS 773.]

Reported by Najib Tamby

JUDGMENT

Abdul Wahab Patail JCA:

[1] The applicant, Sundarajan a/l Sokalingam ("the appellant") appealed against the decision of the High Court which affirmed the finding of guilt by the disciplinary board ("the respondent") of misconduct on the part of the appellant, and reducing the period of suspension from legal practice from 12 months to six months. As usual the Bar Council of Malaysia ("the intervener") appeared as intervener on behalf of the respondent.

[2] This court heard and allowed the appeal, set aside the order of suspension, ordered the deposit be refunded but made no order as to costs. Our reasons follow after the brief facts below.

The Brief Facts

[3] By letter dated 7 October 2004, the respondent Frederick Indran a/l X A Nicholas, the Chairman of the Perak Bar Committee at the material time, wrote to inform the respondent about an incident in the Ipoh Sessions Court on 27 September 2004 involving the appellant in a criminal trial ("the incident") in the Ipoh Sessions Court. The judge of the Ipoh Sessions Court confirmed that in the incident, the appellant had sought someone to impersonate an accused represented by the appellant in a criminal case and to 'stand in' for the accused when the criminal case was called before the judge ("the appellant's conduct"). It was conduct that struck at the very foundations of the criminal justice system that it is the offender, not his surrogate, who must appear and be punished.

[4] By a letter dated 21 October 2004, the intervener issued a show cause letter to the appellant, requiring an explanation in respect of the incident.

[5] In its meeting of 13 August 2005, the respondent decided to constitute an investigating tribunal ("IT"). The IT conducted an inquiry and concluded there was merit in the complaint. A disciplinary committee ("DC") was constituted on 10 May 2010 by the respondent. But although the DC concluded its inquiry on 18 August 2010, it made its finding and recommendation only almost two years seven months later on 15 March 2013. The DC recommended a suspension of three months and a fine of RM8,000.

[6] Having, on 20 June 2013, required the appellant to make his representation under s. 94(3)(a) of the LPA, the respondent made an order of suspension from practice against the appellant for 12 months.

[7] The appellant appealed to the High Court. The High Court allowed the appeal in part to reduce the period of suspension from practice to six months.

The Appeal

[8] Notwithstanding that his period of suspension had been reduced by the High Court, the appellant appealed to this court. The appellant's appeal was not in respect of the length of the suspension. It was against the imposition of any punishment at all. The primary grounds pursued before this court, *inter alia*, concerned:

(a) Incomplete record, missing date of hearing, incomplete disclosure in chronology of events, list of exhibits;

(b) Section 103B of the LPA;

(c) Rule 26 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal And Disciplinary Committee) Rules 1994 PU(A) 189/1994 ("r. 26");

(d) Provisions as to time under the LPA;

(e) *Locus standi* of members of the DC to make the report on 15 March 2013;

(f) Whether order of suspension by the respondent is *ultra vires*;

(g) Breach of natural justice;

(h) Validity of the IT proceedings; and

(i) Condonation.

[9] We note there was no appeal before us by the respondent. The absence of an appeal to restore the suspension of 12 months meant that the intervener accepted the reduction to six months' suspension from practice.

[10] Notwithstanding that the appellant herein, Sundarajan a/l Sokalingam was the applicant before the High Court, the intervener submitted that the appeal before this court was "... to hear an appeal against the decision of the applicant DB").

[11] The intervener then embarked upon submissions on the jurisdiction of the Court of Appeal. It relied upon:

(a) *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878, that it is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession; and

(b) *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405; [1998] 1 MLJ 153 FC, that "... the disciplinary tribunal of a professional body being the best persons to judge the seriousness of professional misconduct and that it would require an exceptional case to enable a court to interfere with their decision on the punishment".

[12] These authorities are to the effect that ordinarily the courts defer to the assessment of the disciplinary tribunal of a professional body and intervenes only in an exceptional case. That has nothing to do with jurisdiction of the court.

[13] Without there being an appeal to restore the order of suspension for 12 months or to increase it further, the submissions for the intervener merely served to defend the punishment of six months' suspension for the appellant's conduct.

Consideration And Reasoning

[14] The appellant submitted that the chronology of events in the record submitted to the DB by the DC failed to include the record of proceedings on 30 July 2010. The appellant produced a copy of a letter from the DC notifying the appellant of a hearing on 30 July 2010. That alone, without more, cannot support the submission that it was "... a serious and

A fundamental defect which goes against the rules of natural justice". Similarly the failure to state in the list of exhibits and correspondence to the DC who tendered the exhibits and when, as well as "not properly marked for parties to refer" merely went to inconvenience which could readily be remedied if objected to. We, therefore, dismiss the submission for the appellant that:

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> ... What we can remember is we submitted the notes of evidence as part of our evidence on 30/07/2010 but no record shows there was a bicara on the 30/07/2010 and who marked this Notes of Proceeding as part of proceedings at DC hearing. This against goes to show that the DCs finding is totally devoid of merit and goes against the rules of natural justice.

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> ... In our case, as we argued earlier the record is not complete i.e, dates of hearing missing; Notes of Evidence recorded on 30/07/2010 is missing; absence of exhibits unmarked which clearly show the findings of the DC is a miscarriage of justice.

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[15] Section 103B of the LPA ("s. 103B") effective 3 June 2014 provides:

> (1) The Disciplinary Committee shall, within one month of its appointment, commence its inquiry into the written application or complaint and shall make its findings expeditiously.

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> (1A) The Disciplinary Committee shall keep a note of the proceedings of the inquiry and submit the findings and the notes of the proceedings to the Disciplinary Board.

[16] Although prior to 3 June 2014 the section did not impose a requirement that the DC submits its findings and recommendations expeditiously, we make the following observations:

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(a) The nature of the appellant's conduct demanded that action be taken quickly and firmly while the event was fresh in the minds of everyone, so that there is no uncertainty as to the rejection and condemnation of such conduct. With the delay of two years and seven months, the event had begun to recede into the pale mists of time. In the meantime, except for the period of six months when the appellant served a sentence of imprisonment, the appellant continued to practice. The delay was very much longer than the period of suspension recommended by the DC, and the period of suspension imposed by the respondent. The reduction, upon appeal, to six months' suspension added to the impression that the conduct was only mildly disapproved; and

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(b) Had the findings and recommendations been made within a reasonable time considering the gravity of the incident, and even assuming that the DB imposed punishment of 12 months' suspension from practice, it is arguable that the six months' suspension by the High Court, his term of imprisonment from 22 February 2011 could have coincided with at least

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part of the period of suspension. Delayed, the appellant faced the prospect of suffering six month's suspension in addition to the period he was unable to practice when serving his sentence of imprisonment. This alone would not be sufficient in our view to set aside the suspension of six months imposed by the High Court. More to the point was the lack of an acceptable explanation for the delay of almost two years seven months.

[17] It was submitted by the intervener that the delay was technical, since at all times, except during his period of imprisonment, the appellant had continued to practice, he had suffered no prejudice whatsoever. We find no merit in this submission which originates from procedural time limits (see O. 1A of the Rules of Court 2012). It cannot be applied to ignore or override time periods set down by statutory provisions. Although the section did not and still does not set down any fixed time, it requires explanation when on the face of it there was a delay and the matter was one that required a firm and timely response.

[18] Rule 26 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 PU(A) 189/1994 provides that:

(1) The report of the Disciplinary Committee shall state the findings of fact and the recommendations of the Disciplinary Committee and shall be signed by the chairman and the members of the Disciplinary Committee.

(2) The report of the Disciplinary Committee together with the record of the investigation proceedings shall be sent to the Director within two months from the date of the appointment of the Disciplinary Committee.

(3) The period prescribed in subrule (2) may, upon an application in writing made by the chairman of the Disciplinary Committee, be extended by the chairman of the Disciplinary Board if there exists reasonable grounds to do so.

[19] It is not the case for the intervener and the respondent that extension of time had been granted (a) upon an application in writing made by the chairman of the DC and (b) upon existence of reasonable grounds to give an extension of time. We reproduce below from the written submissions the following:

15. Although the Appellant is trying to raise some issues irregularity ('irregularity') so that the results of the Disciplinary Board can be waived by this Honourable Court, but the issue of irregularity cannot hide and/or deny the fact that the Appellant had committed the said misconduct and Disciplinary Board is authorised under Section 94 of the LPA to revoke or suspend a practicing certificate of the Appellant. In this case, the Disciplinary Board has given reasonable and commensurate with the misconduct of the Appellant.

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> 16. We also humbly submit that whether there is a delay in the establishment of Disciplinary Committee or whether there is a delay in the preparation of reports of the Disciplinary Committee, it will not affect the merits of the case, particularly the Appellant's case because it is clear and undisputed that the Appellant had committed said misconduct.

B **[20]** The submission above invited this court to accept a view akin to accepting that a criminal may be punished notwithstanding absence of proof beyond reasonable doubt because he had committed a crime. It is a principle that establishes anarchy, and we have no doubt that a court accepting it would rightly be condemned. The submission is therefore entirely without merit. More so since Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 PU(A) 189/1994 was made by the DB under the powers conferred by s. 103F of the LPA.

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[21] We reproduce below from the written submissions addressing the appellant's submission that by the time the DC made its report stating its findings and recommendations, the two year term of the DC panel had expired:

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> 20. The complaint of 'delay' of the Disciplinary Committee in giving it's decision after their 2 year 'lifespan' and that it took more than 2 months for the Disciplinary Committee to submit it's Report; is undeniably technical without any substantive effect to the Appellant or his livelihood.
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> 21. It is our submission that the DCP's term of appointment does not automatically terminate after the expiry of 2 years upon reading of the provision of the DCP's inception under the LPA 1976.
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> 22. Therefore, even if the report and recommendation by the DCP was signed and delivered to the DB after 2 years. It does not render the Report invalid NOR would it extend to make the DB's decision void.
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> 23. The LPA does NOT stipulate that the term of 'every member of the Disciplinary Committee Panel shall cease after two years'. It instead only provides that the minimum period of serving tenure with the DCP shall be two years.
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> 24. The provision clause of 'provided that the Disciplinary Board may extend his term shows further that the intent of the draftsman of this provision was to empower the DB with discretionary powers to extend the said minimum term. It does in no way provide an mandatory cessation or mandatory restriction that the DB SHALL or MUST extend the term should the term exceed 2 years.
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> 25. The provisionary clause should therefore be read in terms of whether the minimum term of the DCP member can be extended or not instead of enlarging the interpretation or worst still imparting prohibitory exclusions in Section 96(2) to deem automatic cessation of the DCP members after 2 years.

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[22] Whether the term of two years is the minimum term is beside the point. Rule 26(3) provides that the term may be extended (a) upon an application in writing made by the chairman of the DC, and (b) by the chairman of the disciplinary board if there exists reasonable grounds to do so. Neither of these were put before this court or the High Court. Without the term being extended, the term of appointment had expired and any such member of a DC panel no longer has authority to continue as a member of the panel to submit a report. The requirement establishes the authority of the DC panel to submit a report for the consideration of the DB. Since from the delay of almost two years and seven months means that the two-year term would have expired, and there being no extension made in accordance with r. 26, it is clear the report made on 15 March 2013 was not a report in accordance with the LPA and its rules and should have been rejected in totality and not accepted as the basis to impose any punishment.

[23] The scheme of the LPA and its rules is that (a) there is an inquiry by the DC (s. 103B), leading to its report containing, *inter alia*, its findings and recommendations, being submitted to the DB, (b) the decision of the DB, regardless whether it accepts or rejects the report, is made after a consideration of the report by the DC, and (c) if the DB intends to make an order that is likely adverse against an advocate and solicitor, he is notified of the DB's intention to do so and he is afforded a reasonable opportunity to be heard. These are fundamental foundations for well considered, fair and just decisions, eliminating as far as possible decisions that are precipitate, hasty, reckless, impetuous, irrational or worse, where a person is condemned and the proceedings before the DB mere exigency for it to pronounce punishment.

[24] We do not overlook that fact that the appellant's conduct is one that must be firmly condemned. He had not gotten off scot free. He had been convicted and sentenced to a substantial term of imprisonment for his conduct. The matter before the DB was whether, in addition to having been convicted for his conduct and had served sentence, he should be punished professionally with an order of suspension from practice for six months. What is questioned is the adherence to the process by which he as an advocate and solicitor is punished professionally. In this consideration, we were much reminded of the 'Blackstone's ratio', where the great English jurist William Blackstone stated, with regard to punishment, the principle in his commentaries on the Laws of England that:

> It is better that ten guilty persons escape than one innocent suffer.

[25] Professional punishment is punishment nevertheless. Strict rules of procedure augment the strict standard of proof, and are applied equally to all persons against whom punishment is sought for their conduct. There is no doubt, in this case as to the appellant's conduct, and that it warranted professional punishment. But it is not reason to forgo or to abandon the rules that ensure justice and fairness, and which are applicable equally to all.

A **[26]** We considered the alternative of setting aside the suspension and remitting the matter to the DB to begin the process afresh and to appoint a DC panel. But given that the incident occurred on 27 September 2004, that the appellant had been convicted and had served a sentence of imprisonment, had appeared before the IT, DC, DB, the High Court and now before this B court, it is our considered conclusion that the imperative of punishing him professionally by starting the process afresh is far outweighed by what he had endured, and the point of the exercise as a professional punishment is by now so lost in the mists of time that, being undertaken by the very same body in the flawed earlier proceedings, it might take on the appearance of vindictive C punishment.

[27] For the foregoing reasons, we made the orders set out in para. 2 above. It is unnecessary to address the appellant's submissions in respect of (a) the validity of the IT proceedings for the reason there is no longer an IT in disciplinary proceedings, or (b) condonation separately.

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